## SUBJECT INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Constitutional and Statutory Provisions Involved | 3 |
| Statement of the Case | 4 |
| Reasons for Granting Writ | 7 |
| Conclusion | 8 |

Appendices:

| | |
|---|---|
| Appendix A | A-1 |
| Appendix B | A-3 |
| Appendix C | A-20 |
| Appendix D-1 | A-24 |
| Appendix D-2 | A-30 |


## TABLES OF AUTHORITY

### Table of Cases


*Commonwealth Coatings Corp. v. Continental Gas. Co.*, 393 U.S. 145 (1968) ..... 7-8

*Connelly v. Gibson*, 335 U.S. 41 (1957) ..... 7

*Czosek v. O'Mara*, 397 U.S. 25 (1970) ..... 7

*Edwards v. Capital Airlines*, 176 F.2d 755 (C.A.D.C., 1949) ..... 8

*Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324 (1969) ..... 7, 8

*Gunther v. San Diego & Ariz. E. R. Co.*, 382 U.S. 257 (1965) ..... 6, 7

*In re Captain David G. Rall*, ALPA case No. 5562 ..... 2

*In re R. E. Lee discharge*, ALPA case No. 5563 ..... 2

*Page*

*Northwest Airlines, Inc. v. ALPA, Rall and Lee*, 373 F.2d 136 (8th Cir., cert. denied 389 U.S. 827 (1967) ..... 2, 6

*Smith v. General Elec. Co.*, 63 Wn.2d 624, 388 P.2d 550 (1964) ..... 4

*Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) ..... 7

*Transcontinental & Western A.R. Co. v. Koppal*, 345 U.S. 363 ..... 4

**Constitutional Provisions**

United States Constitution, Fifth Amendment ..... 3

**Statutes**

28 U.S.C.A. §1254(1) ..... 2

45 U.S.C.A. §153 First (q) ..... 2, 3, 6, 7

45 U.S.C.A. §184 (Railway Labor Act, Title II, 204) ..... 2, 3, 5

IN THE

# Supreme Court of the United States

October Term, 1970

No. .....

FRANKLIN E. TODD,
*Petitioner,*

v.

NORTHWEST AIRLINES, INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue from this court to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cause on February 11, 1971.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (app. A), is reported at ..... F.2d ..... (1971). No petition for rehearing was filed. The court of appeals affirmed the decision of the district court for the Western District of Washington. That court's unreported memorandum decision dated January 28, 1969, is attached hereto as appendix B.

The district court had affirmed an unreported award entered on September 28, 1964, by a System Board of Adjustment impaneled by Northwest Airlines, Inc.,

(NWA or company), and the International Association of Machinists, pursuant to 45 U.S.C.A. §184 (Railway Labor Act, title II, §204). A copy of this award is attached as appendix C.

Also of importance are awards in companion cases involving the discipline of other flight-crew members. These awards involved the same neutral, but were decided by a System Board of Adjustment impaneled by NWA and the Airline Pilots Association (ALPA). These unreported awards are: *In re Captain David G. Rall,* ALPA case no. 5562, and *In re R. E. Lee discharge,* ALPA case no. 5563, and are attached as appendices D(1) and D(2), respectively. These awards were enforced in *Northwest Airlines, Inc. v. ALPA, Rall and Lee,* 373 F.2d 136 (8th Cir., cert. denied 389 U.S. 827 (1967)). However, the appellate proceedings are not material to this case.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was decided and entered on February 11, 1971. No petition was made for rehearing. The jurisdiction of this court is invoked under 45 U.S.C.A §153 First (q) and 28 U.S.C.A. §1254(1).

## QUESTION PRESENTED

May a reviewing federal court impeach the findings contained in a System Board of Adjustment award when the record of proceedings before the board discloses evidence of lack of fair representation because of hostility between the grievant and his union representative?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of . . . property without due process of law."

45 U.S.C.A. §184 provides:

> ". . . It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of adjudication not exceeding the jurisdiction which may be lawfully exercised by System . . . Boards of Adjustment under the authority of §3, title I (45 U.S.C.A §153) of this Act."

45 U.S.C.A. §153 First (q) provides:

> "If any employee . . . is aggrieved by the failure . . . of the Adjustment Board to make an award . . . or is aggrieved by any of the terms of an award . . . then such employee may file in any United States district court . . . a petition for review of the Division's order . . . The court shall have jurisdiction to affirm the order of the Division or to set it aside, in whole or in part, or it may remand the proceeding to the Division for such further action as it may direct. On such review, the findings and order of the Division shall be conclusive on the parties except that the order of the Division may set aside, in whole or in part, or remand it to the Division for failure of the Division to comply with the requirements of this Act, for failure of the order to conform or confine itself to matters within the scope of the Division's jurisdiction, or for fraud or corruption by a member of the Division making the order. The judgment of the court shall be subject to review, as provided in Sections 1291 and 1254 of Title 28, United States Code."

## STATEMENT OF THE CASE

The petitioner, Frank Todd, had been a longtime flight engineer employee of Northwest Airlines. Flight engineers were represented in collective bargaining by the International Association of Machinists, hereinafter referred to as "union." Prior to Todd's discharge by the company, he had been expelled from the union for dual unionism, *i.e.*, attempting to get another union substituted as his bargaining representative. Todd had also been instrumental in organizing a federal court lawsuit in which flight engineers sued the company, the union, and the union representing pilots, claiming conspiracy to deprive flight engineers of their right of fair representation.

In February of 1964, the company discharged Todd, David Rall, (a pilot), and Robert Lee, (a copilot). Rall was discharged for having used alcoholic beverages within the 24-hour period before a flight and serving as a crew member during a period of known physical disability. Lee was discharged for having served as pilot and second in command with a first pilot having an apparent physical deficiency, and Todd was discharged for a violation of the 24-hour rule and because he "influenced and encouraged the first pilot and other crew members to fly . . . at a time when he knew of the physcial deficiency of the first pilot."

Applicable state law required that Todd could not bring a wrongful discharge action until he exhausted his contractual remedies. (See *Transcontinental & Western A.R. Co. v. Koppal*, 345 U.S. 363; *Smith v. General Elec. Co.*, 63 Wn.2d 624, 388 P.2d 550 (1964)). In conformance with his contract, Todd thus took the necessary steps to

cause the union to impanel a System Board of Adjustment, which was the prescribed method of adjusting his grievance under the contract, as required by 45 U.S.C.A. §184. Simultaneously, Rall and Lee requested the impaneling of a System Board of Adjustment under their collective bargaining agreement.

The union contract in force between Todd's union and the company, required a System Board of Adjustment made up of a representative of the company, a representative of the union, and a neutral selected by the National Mediation Board. Walter L. Gray, a Tulsa attorney, was the neutral assigned to the Todd hearing.

At the hearing, the union assigned an official, Arthur Pedersen, to prosecute Todd's grievance. Pedersen was the same union officer who had previously preferred charges and prosecuted Todd's expulsion from the union. Todd appeared at the hearing with his own attorney, but Pedersen, upon behalf of the union, threatened to withdraw the grievance from arbitration unless Todd consented to allow Pedersen to have exclusive control over the presentation of any defenses relating to the discharge case which were based upon the application of the collective bargaining agreement and work rules of the company. Under this threat of withdrawal, Todd and his attorney reluctantly agreed to the format established by the union.

After the close of the System Board hearing, the board entered an award dismissing the charge that Todd had violated the 24-hour rule. However, the award affirmed the discharge finding that Todd has "influenced and encouraged the first pilot and other crew members to fly . . . at a time when he had good reason to believe the

first pilot should not take out the flight in the interest of public safety." It should be noted that this was a deviation from the original charge upon which the company based Todd's discharge.

Thereafter the grievances of the pilot and copilot were heard by a System Board of Adjustment composed of representatives of the pilots' union, the company, but with the same neutral, Walter Gray. In those cases no question of hostility of representation was raised, and the neutral held that discharge was too severe a penalty to be imposed upon either the pilot or the copilot. The awards involving the pilot and copilot were later sustained in enforcement proceedings (see *Northwest Airlines v. ALPA, Rall and Lee, supra*).

After the award sustaining Todd's discharge, Todd commenced this action in the Federal District Court for the Western District of Washington to set aside this award. The district court treated the findings contained in the award as being final and binding, as required by this court's decision in *Gunther v. San Diego & Ariz. E. R. Co.*, 382 U.S. 257 (1965) and 45 U.S.C.A. §153 First (q). The district court entered a summary judgment dismissing Todd's claim. An appeal was then taken to the Court of Appeals for the Ninth Circuit. The appeals court noted the inconsistency between the Rall and Lee awards and the Todd award, but in affirming the decision of the district court, stated:

> "Much as we would like to see consistent results here, it is beyond our power to order them."

From the court of appeal's judgment, this petition for a writ of certiorari is taken.

## REASONS FOR GRANTING WRIT

Petitioner requests that this court review the decision of the Court of Appeals for the Ninth Circuit to determine whether the lower federal courts have fulfilled "their role as the primary guardians of the duty of fair representation." (See *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970)). Petitioner urges this consideration, since this case presents for the first time the application of the doctrine of fair representation to the reviewability of an award of a System Board of Adjustment, a question which has not been, but should be, settled by this court.

Since the genesis of the doctrine of fair representation in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), this court has carefully preserved access to the federal courts when a claim of hostile representation has been made by a workman. (See *e.g., Connelly v. Gibson*, 335 U.S 41 (1957); *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324 (1969); *Czosek v. O'Mara, supra.*) However, this court has yet to determine the ramifications of the doctrine of fair representation as applied to the finality of System Board of Adjustment awards established under 45 U.S.C.A. §153 First (q), and this court's decision in *Gunther v. San Diego & Ariz. E.R. Co.*, 382 U.S. 257 (1965).

It is the position of petitioner that this court should grant the petition for certiorari herein requested and enunciate the rule that System Boards of Adjustment are governed by the general principle of arbitration established by this court in *Commonwealth Coatings Corp. v. Continental Gas. Co.*, 393 U.S. 145, 149 (1968), "that any tribunal permitted by law to try cases in controversies

must not only be unbiased, but must avoid even the appearance of bias." In addition, petitioner requests that the court adopt the logic of *Edwards v. Capital Airlines,* 176 F.2d 755 (C.A.D.C. 1949), that if, when a federal court reviews a System Board of Adjustment award it finds any substantial evidence of hostility between the grievant and the union, it is not bound to accept the findings contained in the award, but may review the underlying facts and circumstances to determine whether the grievant received fundamental due process in the handling of his grievance.

The therapeutic intervention of the federal judiciary in this type of situation is absolutely essential, since, as this court has recognized:

> "[I]t is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp. v. Maddox,* 379 U.S. 650 [13 L.Ed.2d 580, 85 S.Ct. 614]. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant." *Glover v. St. Louis-S.F.R. Co., supra,* at 330.

## CONCLUSION

For the reasons hereinabove submitted, this court should grant a writ of certiorari directed to the Court of Appeals for the Ninth Circuit, and should reverse the decision of that court.

Respectfully submitted,

GEORGE J. TOULOUSE, JR., and
ARNOLD J. BARER
*Counsel for Petitioner*

Of Counsel:
WETTRICK, TOLOUSE, LIRHUS
& HOVE

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| FRANKLIN E. TODD, *Plaintiff and Appellant,* v. NORTHWEST AIRLINES, INC., *Appellee.* | No. 24,050 |

[February 11, 1971]

On Appeal from the United States District Court for the Western District of Washington Northern Division

---

Before: CHAMBERS, MURRAH and HUFSTEDLER, Circuit Judges.

PER CURIAM:

The final order of the district court approving an award of a System Board of Adjustment, impaneled under the Railway Labor Act, is affirmed. We do it on the basis of the district court's decision, Todd v. Northwest Airlines, Inc., —F. Supp.—.

Todd was the junior member of a flight crew and he has been discharged because he "influenced and encouraged the first pilot and other crew members to fly Flight No. 27 of January 1, 1964, at a time when he had good reason to believe the first pilot should not take out the flight in the interest of public safety."

Todd was the one who "leaked" word of the first pilot's condition on the critical day. Another system board disci-

plined Pilot Rall and co-pilot Lee, but did not order their discharge. That award was left undisturbed by Northwest Airlines, Inc., v. ALPA, Rall and Lee, 373 F.2d 136 (8th Cir.), *cert. den.* 389 U.S. 827.

Much as we would like to see consistent results here, it is beyond our power to order them. We cannot say the trial court erred in approving the award of Todd's board.

## APPENDIX B

## UNITED STATES DISTRICT COURT
## WESTERN DISTRICT OF WASHINGTON
## NORTHERN DIVISION

| | |
|---|---|
| FRANKLIN E. TODD, *Plaintiff,* v. NORTHWEST AIRLINES, INC., *Defendant.* | Civil Action No. 6638 MEMORANDUM OPINION |

This is an action brought by plaintiff, Franklin E. Todd, a flight engineer formerly employed by the defendant, Northwest Airlines, seeking to set aside an arbitration order by the System Board of Adjustment. Specifically, the plaintiff asks this court to set aside an order of the System Board entered September 28, 1964, which affirmed the defendant's termination of plaintiff's employment on the grounds that the plaintiff "influenced and encouraged the first pilot and other crew members to fly Flight No. 27 of January 1, 1964, at a time when he had good reason to believe the first pilot should not take out the flight in the interest of public safety."

Plaintiff also seeks contract damages because of an alleged wrongful discharge and alleged breach of employment contract by the defendant.

After discovery and pretrial conferences a pretrial order was entered (referred to as Pretrial Order No. 1) for the purpose of submitting the case upon motions of both parties for summary judgment on the issue of whether or not the award of the System Board of Adjustment should be set aside. For the purpose of this memorandum opinion

it will be helpful to set forth the pretrial order verbatim:

"Pursuant to Rule 16 of the Federal Rules of Civil Procedure and in accordance with the pretrial conference held on June 14, 1968, the following formulation of issues is herein set forth:

"I. JURISDICTION

"Without defendant's waiving its contention that this court does not have jurisdiction to hear this matter for the reasons hereinafter set forth in defendant's Contentions of Law, the parties agree that:

"1. The plaintiff is a citizen of the State of Washington and was formerly employed by the defendant as a flight engineer.

"2. The defendant is a Minnesota corporation with principal offices in Minneapolis-St. Paul, is engaged in the business of an interstate air carrier and does business in the State of Washington.

"3. The damages sought by the plaintiff exceed $10,000 exclusive of interest and costs.

"4. Plaintiff seeks a review of a System Board of Adjustment Order entered September 28, 1964, which affirmed the defendant's termination of plaintiff's employment. This court's review of the Adjustment Board Order is governed by Sections 153, 181 and 184 of the Railway Labor Act. 45 U.S.C.A., §153, 181, 184.

"II. ADMITTED FACTS

"1. On or about February 28, 1964, and prior thereto, plaintiff was employed as a flight engineer for Northwest Airlines, Inc.

"2. Northwest Airlines, Inc. had entered a collective bargaining agreement with the International Association of Machinists for and on behalf of flight engineers. Said contract was for the benefit of plaintiff and granted rights of tenure and seniority to plaintiff.

"3. On or about February 28, 1964, defendant terminated plaintiff's employment with Northwest Airlines, Inc.

"4. The collective bargaining agreement hereinabove referred to contained certain grievance procedure in the event of Company-imposed discipline on plaintiff. All of the conditions precedent to invoking the grievance procedure were met by plaintiff or his representatives.

"5. On August 18, 19 and 20, 1964, a grievance hearing was held in Minneapolis-St. Paul, Minnesota, before a System Board of Adjustment duly impaneled under the aforesaid agreement. The company charges filed against the plaintiff were:

" 'A. He served as a crew member on Flight No. 27 of January 1, 1964, having used alcoholic beverages during the twenty-four-hour period immediately preceding the departure time of Flight No. 27 of January 1, 1964.

" 'B. Further, he influenced and encouraged the first pilot and other crew members to fly Flight No. 27 of January 1, 1964, at a time when he knew of the physical deficiency of the first pilot assigned to the flight.'

"6. On September 28, 1964, the System Board of Adjustment rendered its award against the plaintiff, sustaining the company's termination of plaintiff's employment.

"7. Walter L. Gray, of Oklahoma City, was the neutral arbitrator in the System Board of Adjustment hearing involving the plaintiff.

"The following additional facts are not disputed but defendant contends they are not relevant to the issues of this case:

"1. In the course of the System Board of Adjustment hearing involving plaintiff a letter was introduced in evidence, a copy of which is referred to in plaintiff's listed exhibits.

"2. Subsequently, in October, 1964, a System Board of Adjustment hearing was held pursuant to a collective bargaining agreement entered into by and between defendant, the Airline Pilots Association,

with respect to the termination of David G. Rall, pilot of Northwest Flight No. 27 of January 1, 1964; and in November, 1964, a System Board of Adjustment hearing was held pursuant to a collective bargaining agreement entered into by and between defendant, the Airline Pilots Association, with respect to the termination of Robert E. Lee, co-pilot of Northwest Flight No. 27 of January 1, 1964.

"3. Walter L. Gray, of Oklahoma City, was the neutral arbitrator in the System Board of Adjustment hearing involving Rall and Lee.

"4. On or about January 8, 1965, a decision was rendered in the System Board of Adjustment matters involving the said Rall and Lee, disciplining them, but not terminating their employment.

"III. DISPUTED FACTS

"A. Plaintiff contends as follows:

"1. That the letter referred to in paragraph 1. on pages 3 and 7 of this pre-trial order and referred to in plaintiff's exhibits, is a forgery in that it was not the letter signed by Peter Kama.

"2. That the award imposing discipline upon the plaintiff herein is without foundation in reason or fact, in light of the following factors:

"(a) The duties of a flight engineer;

"(b) His relative responsibilities in the operation of aircraft;

"(c) His responsibility to follow the commands of the pilot and co-pilot;

"(d) The discipline imposed upon David G. Rall and Robert E. Lee;

"(e) Other discipline imposed in the administration of other grievance proceedings involving Northwest Airlines personnel.

"B. Defendant contends that for the purposes of this pre-trial order there are no issues of fact for the court.

"IV. ISSUES OF LAW

"The parties agree that under the applicable sections of the Railway Labor Act including Sections 153, 181 and 184, the findings and order of the division of the System Board of Adjustment 'shall be conclusive on the parties,' except that the findings and order may be reviewed by a District Court upon the following basis:

"1. Whether or not the plaintiff was denied due process by some conduct of the Adjustment Board in making its award.

"2. Fraud or corruption was practiced by a member (of the System Board of Adjustment) making the order.

"3. The award of the Adjustment Board was so arbitrary or capricious as to be wholly baseless and completely without reason.

"A. Plaintiff contends the following to be the issues of law:

"1. That the discipline award in this case is arbitrary and capricious and denies him due process as a matter of fact and law in light of the facts herein, and particularly in light of plaintiff's contentions contended in paragraph III 2. A.

"2. That defendant's introduction into evidence of the Peter Kama letter constituted fraud practiced by a party to the System Board of Adjustment proceeding.

"3. With respect to the remedy sought by the plaintiff in this case, in the event that plaintiff can as a matter of fact and law, impeach the award of the Board of Adjustment, an issue is raised as to the remedy which the court may grant. The parties agree that the award of the System Board of Adjustment bars plaintiff from proceeding under a common law theory of wrongful discharge. However, plaintiff contends that the court, upon the voiding of the System Board of Adjustment proceeding, has the power to entertain such an action.

"B. Defendant contends the following to be the issues of law:

"1. The decision of the System Board of Adjustment, which was rendered pursuant to mandatory arbitration procedure as set out in the Collective Bargaining Agreement upholding the company's discharge of the plaintiff, was final and binding upon the parties, by virtue of Section 153 of the Railway Labor Act which provided that an order of the division of the System Board of Adjustment 'shall be conclusive on the parties.'

"2. Plaintiff's invoking the grievance procedure, provided by the Collective Bargaining Agreement, contesting his discharge by the company constitutes an election of remedies; plaintiff therefore cannot maintain a court action to recover damages for wrongful discharge.

"(a) Even though this court should set aside the Order of the Adjustment Board on any of the grounds referred to in the previous paragraph of Defendant's Contentions, the court does not have jurisdiction to entertain an action for damages for alleged wrongful discharge.

"V. EXHIBITS

"For the purpose of the court's hearing this action at this stage of the proceedings in determining the various questions of law as contended by the parties, the following exhibits will be considered:

"1. The Collective Bargaining Agreements between Northwest Airlines and International Association of Machinists dated January 1, 1963, and January 21, 1964.

"2. Transcript of the Adjustment Board hearing, including the Adjustment Board Award, entitled:

" 'In the Matter of Arbitration

' "Between

" 'NORTHWEST AIRLINES, INCORPORATED

" 'and

"'INTERNATIONAL ASSOCIATION OF MACHINISTS, District Lodge No. 143

"'IN RE: FRANKLIN E. TODD, Docket 70.'

"The following exhibits will be offered by the plaintiff. Defendant does not dispute their authenticity but contends they are not relevant to the issues of this case:

"(1) The letter of Peter Kama introduced in the System Board of Adjustment hearing as referred to on page 4, paragraph 1. of Plaintiff's Contentions as to disputed facts.

"(2) The charges against David G. Rall and R. E. Lee which were made by Northwest Airlines and which ultimately gave rise to the System Board of Adjustment Hearing of October, 1964, referred to on page 3 of this pre-trial order.

"(3) Portions of the record of the Adjustment Board Proceedings involving the grievance hearing of Rall and Lee which resulted in the Adjustment Board decision of January 8, 1965 referred to on page 4 of this pre-trial order.

"VI. ACTION BY THE COURT

"1. The court will consider the issues as contended by the parties as a basis for granting a summary judgment to the extent of ruling on said issues.

"2. Appropriate motions and briefs will be filed with the court on or by November 8, 1968.

"DATED this 25th day of October, 1968.

"WILLIAM J. LINDBERG
United States District Judge

"FORM APPROVED:

| | |
|---|---|
| | R. L. GEMSON |
| ARNOLD BARER | SKEEL, McKELVY, |
| WETTRICK, TOULOUSE, LIRHUR AND HOVE | HENKE, EVENSON & UHLMAN |
| Attorneys for Plaintiff | Attorneys for Defendant Northwest Airlines, Inc." |

The exhibits referred to in the pre-trial order were admitted and reviewed along with extensive written briefs submitted by both parties in support of their respective motions. After oral argument I indicated that defendant's motion should be granted but withheld ruling so as to permit a further review of the record and reexamination of plaintiff's arguments that the award of the System Board of Adjustment was arbitrary and capricious or void for fraud.

At the outset it should be noted that the court's jurisdiction in this proceeding is granted as well as limited under 45 U.S.C., §153 First (q), which reads in pertinent part as follows:

> "The court shall have jurisdiction to affirm the order of the division (of the board) or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order." (T/A 93-99)

The plaintiff's counsel argues that the record "coldly and clearly" indicates that Todd was not afforded the type

of hearing contemplated by the act and was thus denied due process. This argument is grounded upon circumstances long preceding plaintiff's discharge by Northwest and having to do with the relationship between plaintiff and the International Association of Machinists Union.

In an unrelated proceeding long prior to the System Board of Adjustment hearing in this case, the plaintiff Todd was expelled from the union for dual unionism, as a result of charges preferred by Mr. Pedersen on behalf of the union. The same Mr. Pedersen also was the representative of the union (there being no other union to represent Todd) appearing at the System Board of Adjustment hearing with respect to his grievance against Northwest Airlines. In addition, Todd was one of the number of individual plaintiffs in an independent lawsuit pending against the International Association of Machinists at the time of the board hearing, which suit is still pending in this court. Following his discharge Todd employed his own attorney and appeared at the hearing with his own counsel, Mr. Schumacher. Mr. Pederson was at first adamant in protecting the union's statutory right to represent Todd at the hearing. However, after some colloquy in which the board members as well as counsel took part, and following a recess conference between Pedersen and plaintiff and his counsel, the parties entered into a stipulation whereby Mr. Schumacher was to call and examine witnesses and elicit and argue the facts of the case, while Mr. Pedersen, on behalf of the union, reserved the right to argue questions of contract interpretation. Mr. Todd, through his attorney, accepted this stipulation, and himself expressed assent to having his case heard by the board as then constituted.[1]

1. "REFEREE: Now, I want you to dictate into the record that you have agreed that this is to be bound by this System Board Ruling.

"MR. PEDERSEN: I am going to say more than an agreement, Mr.

In arguing that plaintiff was denied due process under the facts as outlined above he relies on *Edwards v. Capital Airlines*, 176 F.2d 755 (D.C. Cir. 1949), where, in a dispute involving seniority rights among employees, the union presented the claims of the majority against the claims of the two plaintiffs, a small minority and not parties to

---

Chairman, because I want this definitely in the record so it's clear once and for all, the relationship to the International Association of Machinists and its liability.

"I have discussed this question of representation before this board, the System Board of Adjustment, and its liabilities which Mr. Todd has incurred by seeking representation of Mr. Schumacher and his firm and other legal counsel that Mr. Todd may have talked to or used the services of, that it has been agreed by Mr. Schumacher and myself that any and all liabilities incurred by the previous attorneys and law firms are all of Mr. Todd's liability, and none of the International Association of Machinists' liability.

"Further, we have agreed as far as the System Board procedurel-wise, under the agreement, I retain jurisdiction of this discussion before this board;

"Further, if we get into any contractural application under the Flight Engineers Agreement, that I retain the right of this representation.

"Now, as I see the case, there is nothing contracturally that we feel we are going to get involved in, but in the event that we do, that I am the representative party when we get to that point, and therefore I would like on the record a statement by Mr. Schumacher agreeing to this stipulation.

"MR. SCHUMACHER: I agree to the stipulation. I am not an attorney hired or retained by the IAM. I have no connection with them. I have no intent to hold them responsible for any fees or charges.

"I am Mr. Todd's personal attorney, and the agreement as to fees and charges is between me and Mr. Todd, and as to any matters regarding the contract or the authority of the union to make statements regarding it, well, that rests with the IAM and Mr. Pedersen as their representative, and I will agree to proceed on that basis, and I understand I will be permitted and authorized and be in control of calling witnesses and interrogating witnesses and submitting a brief in this case.

"MR. PEDERSEN: This has been agreed upon Mr. Chairman.

"MR. FLOAN: Did you say that you would call witnesses?

"MR. SCHUMACHER: Yes.

"REFEREE: I thought he was going to call the witnesses.

"MR. PEDERSEN: He will be handling the entire presentation before this board on Mr. Todd's behalf.

the proceeding although represented by counsel. There the interests of the majority were clearly antagonistic to those of the plaintiffs. Such is not the situation in our case. Here the union would and apparently did have a definite interest in seeing to it that no precedent was set allowing flight engineers to be fired in circumstances such as plain-

---

"MR. ABBOTT: I accept that agreement of Mr. Pedersen and Mr. Schumacher.

"This means that Mr. Schumacher will conduct the defense of Mr. Todd subject to Mr. Pedersen's argument, if any, that he may offer this board with respect to any interpretation of specific language of the agreement.

"There was one additional comment that seemed to me which you made, Mr. Pedersen, that should be clarified, and that is that this agreement was conditioned upon Mr. Todd assuming the liability for any attorneys' fees that may have been incurred or may be incurred here, and you may recall that Mr. Vance represented Mr. Todd in Seattle.

"Are you referring to fees that Mr. Vance . . .

"MR. PEDERSEN: That is the 'any other attorneys also.'

"MR. ABBOTT: All right. Now, Mr. Schumacher agreed that *his* expenses were those of Mr. Todd. It would appear to me that the entire stipulation has not been accepted.

"REFEREE: Let me ask this question of Mr. Todd. I want you to state into the record, sir, that you assume the liability for the payment of all attorneys' fees and that they will not become the responsibility of either Northwest or IAM.

"MR. TODD: Yes, I will so state; all previous attorneys' fees have been paid with regard to Mr. Vance; and my attorney here today has been retained by me and I will assume all liabilities towards his expenses.

"REFEREE: And do you also agree that you will abide by the decision of this System Board?

"MR. TODD: Yes, I do.

"MR. PEDERSEN: With that, Mr. Chairman, I would like to formally for the record introduce Mr. Schumacher as representing Mr. Frank Todd before this board.

"REFEREE: Okay, but you reserve your rights?

"MR. PEDERSEN: Yes.

"REFEREE: I think we all agreed now and it's in the record and you are bound by it; so don't come along later and say you are going to back out."

(Pages 21-25, Transcript of hearing In the Matter of: *International Association of Machinists District Lodge No. 143 v. Northwest Airlines, Incorporated*, before IAM-NWA System Board of Adjustment, August 18, 1964.)

tiff contended existed.[2] In addition, the record shows that the plaintiff, knowing the attitude of the union, accepted the board, after obtaining a stipulation that his own attorney would be in control of calling witnesses and interrogating witnesses and submitting a brief in the case. Review of the record shows that Mr. Schumacher was indeed in control of eliciting evidence before the board.

The plaintiff complains further that "the tests of *Edwards v. Capital Airlines, supra,* relating to the right to counsel could never be met, since the union forced Todd's counsel, under threat of withdrawing the grievance, to consent to a bifurcation of representation." The basis in the record for this statement appears at the outset of the hearing (Tr. 2 through 21), at which time it was brought out that under the System Board hearing procedure and agreement only the union could bring a case on behalf of an employee whether a union member or not, and in the event the union withdrew from the case Mr. Todd would have no case. When counsel for plaintiff in his supplemental memorandum in support of motion for summary judgment quoted Pedersen as stating Todd "does not have a case" counsel permits the inference that Pedersen was commenting on the merits of Mr. Todd's grievance. Such inference I do not believe permissible. A fair reading and interpretation of the whole colloquy before and after the recess (Tr. 2 through 25) between the board members, counsel and Mr. Pedersen does not indicate any actual threat of withdrawal by the union. Even if such interpretation could be drawn, the stipulation following the recess taken shortly after the opening of the hearing makes clear

2. The dissent of the union member of the division of the Board of Adjustment from the award of the majority approving discharge is persuasive evidence on this issue.

that Mr. Schumacher, Todd's counsel, as well as Mr. Todd, freely and fully agreed to the procedures. Furthermore, the record does not disclose that Mr. Pedersen in any way injected himself into the proceeding thereafter. The record shows that the plaintiff's counsel had considerably more control over the presentation of the plaintiff's case than that exercised by the employees' counsel and approved in *Edwards v. Capital Airlines, supra.*

The plaintiff further complains of the company "attempts to predicate Todd's discharge upon C Manual provision 20:10:5." It should be noted that the principal company regulation relied upon was the company's "C Manual" at reference 60:15:15A.[3] There appears to be nothing in the agreement between Northwest and the union, which governs the procedure to be followed, which requires that dismissal of an employee must be based upon violation of some specific written rule or regulation of the company. The one pertinent provision of the agreement relating to grievances involving discipline is Section 25, Grievance B(3), which reads as follows:

---

3. 5. Request for specification.

You requested a statement of the rule or regulation relied upon by the company with respect to the second charge against you. The company's counsel indicated two sources that were relied upon which were the Federal Aviation Regulations and NWA's Flight Operations Manual, Volume C.

The principle (sic) company regulation governing the conduct of crew members with respect to flight operations is contained in NWA's C Manual at reference 60:15:15 A. This rule establishes the safety of flight operations as the first and most important element of the responsibility of crew members. Your attention is also called to the C Manual and FAR's with respect to the minimum crew requirements and the prohibition against crew members operating with a known physical deficiency. (Volume C reference 20:10:5 and FAR Part 61.45). . .

(From letter dated March 27, 1964 to Todd from NWA in Todd Exhibit 1, In the Matter of: *International Association of Machinists District Lodge No. 143 v. Northwest Airlines, Incorporated, before* IAM-NWA System Board of Adjustment).

"Todd Joint Exhibit 1
Agreement
Dated July 1, 1963)
Section 25
Grievances

* * *

"B. Grievances involving Discipline.

* * *

"(3) Prior to any investigation or hearing the Flight Engineer and the Union General Chairman shall be notified in writing of the precise charge or charges against the Flight Engineer. Thereafter he shall be given necessary time in which to secure the presence of witnesses and shall have the right to be represented by the union in all investigations or hearings."

This section was complied with, and clearly Todd and his counsel were fully aware of the precise charges against him and this was sufficient.

Another contention of plaintiff is that the board's written decision shows that it exceeded its jurisdiction in the case, in that the board only had jurisdiction to rule whether or not the discharge could be supported on the basis of the charges filed by the company. The charge eventually found to be supported by the evidence was:

> "Todd 'influenced and encouraged the first pilot and other crew members to fly Flight No. 27 of January 1, 1964, at a time when he knew of the physical deficiency of the first pilot assigned to the flight.' "

The board's award stated:

> "The board finds that there is sufficient evidence to substantiate the second charge filed against Mr. Todd; he influenced and encouraged the first pilot and other crew members to fly Flight No. 27 of January 1, 1964, at a time when he had good reason to believe the first pilot should not take out the flight in the interest of public safety."

Plaintiff concludes that the slight variation in wording between the award and the filed charge shows that the board exceeded its jurisdiction.

The company is not in the position of nor does it bear the burden of a state in prosecuting a criminal case. This was an arbitration proceeding between the company and the union as representative of the rights of an employee. The award states that there was evidence to support the charge as made, and a reading of the record bears this out. The further statement of facts found does not detract from the general finding and the award made.

The board did have to decide whether under the evidence Todd knew or at least believed Captain Rall at the time involved was under the influence of liquor or suffering from some physical deficiency, and, so believing or having good reason to believe, he nevertheless influenced and encouraged Rall and/or other crew members to fly. Under the charge the board sustained it was not necessary for Northwest to establish that Rall was in fact under the influence of liquor or suffering from some physical deficiency.

The issue was a factual one, the determination of which rested upon credibility of witnesses as well as circumstantial evidence. Gray, the neutral member, and the company member of the board, constituting a majority, accepted the testimony and other evidence in support of the company's position rather than that of Todd, and sustained the action of Northwest in discharging Mr. Todd on the second charge filed against him. The union member of the board apparently accepted Todd's version and dissented from the action of the majority.

Finally, I consider plaintiff's charge of fraud based upon the Kama letter. Assuming it was a forgery (an assumption that is at best highly questionable) there is no evidence or indication of any kind that any member of the board knew this, nor is there any fact from which such an inference could be drawn. Thus there is no support whatsoever for the charge that fraud or corruption was practiced by a member of the board or a party to the proceeding so far as the letter is concerned, and there has been no other basis of fraud brought before the court.

From Todd's point of view, there was great disparity between the discipline imposed upon him and that finally meted out to Rall and Lee under the award of the board in that case. The same occurrences were under examination in both proceedings. The focus in each case was on the participation of different individuals, it is true, but the duties and activities of the three employees interlocked closely enough on the day in question that one would naturally expect a certain consistency in the treatment of all three. Northwest Airlines certainly thought so, for it fired all three. However, when the cases came before the System Board of Adjustment, Todd's discharge was affirmed, and Lee and Rall received relatively short suspensions.

If the law required consistency in the results of these two proceedings, this would not mean that the result in Todd's case was necessarily improper. If the consistency requirement rested on some principle of collateral estoppel, *res judicata,* or lack of disparity, it would seem a more logical result to expect that the decision of the Lee-Rall System Board of Adjustment hearing should have been overturned, and that Lee and Rall should have been discharged, just as Todd was. The hearings were adversary

proceedings in which both the airline and the employees had rights to be protected, and the right of the airline to fire for misconduct was, and is, no less worthy of protection than the right of the employees to continued employment.

However, the two proceedings were separate proceedings, and the evidence was not exactly the same in each. Nor is it certain that the witnesses which seemed most credible in the Todd case were just as believable in the second proceeding. The results of the two cases are fully consistent with the presumption that the board in each case considered the evidence before it in the case, and made its ruling in accordance with that evidence.

The court has read the extensive record in this case, considered the applicable law and finds and concludes that the award of the System Board of Adjustment was not arbitrary or capricious, that no fraud or corruption was practiced by a member (of the System Board of Adjustment) making the order; and that there was no fundamental unfairness which might amount to a denial of due process. Failing this, the court has no jurisdiction to make any change in the award of the System Board of Adjustment.

Defendant's motion for summary judgment will be granted and an order dismissing the complaint may be entered.

DATED January 28, 1969.

WILLIAM J. LINDBERG
United States District Judge

## APPENDIX C

In the Matter of Arbitration
Between
NORTHWEST AIRLINES, INCORPORATED
and
INTERNATIONAL ASSOCIATION OF MACHINISTS,
District Lodge No. 143
IN RE: FRANKLIN E. TODD, Docket 70

### AWARD

This matter was heard in the General Offices of the Northwest Airlines at Minneapolis-St. Paul, Minnesota, on August 18, 19, and 20, 1964, involving the discharge of Franklin E. Todd who was employed by Northwest Airlines as a Flight Engineer during February, 1962.

1. The evidence as introduced in the hearing showed that Mr. Todd's employment began with Northwest Airlines on January 30, 1948, in the capacity of mechanic and that at the time of his discharge on February 28, 1964, he was a Flight Engineer.

2. The charges as filed against Mr. Todd were:

A. He served as a crew member of Flight No. 27 of January 1, 1964, having used alcoholic beverages during the twenty-four-hour period immediately preceding the departure time of Flight No. 27 of January 1, 1964.

B. Further, he influenced and encouraged the first pilot and other crew members to fly Flight No. 27 of January 1, 1964, at a time when he knew of the physical deficiency of the first pilot assigned to the flight.

3. Mr. Todd asked that he be reinstated to the position of Flight Engineer and that he be paid for loss of time from

the date of discharge at the salary he was drawing at the time of his discharge.

4. Mr. Todd insisted that he not be represented by the representatives of the International Association of Machinists, District Lodge 143, but that he claim the right to employ his own private counsel, and after a great deal of discussion, Mr. Todd publicly stated that he would assume the liability of the payment for all attorney fees and that he assumed all liability toward his expenses. It was further stipulated and agreed that the case should be handled by the private attorney for Mr. Todd but that the International Association of Machinists retain jurisdiction of the discussion before this board and that in no way would the Association relinquish its legal rights.

5. Mr. Todd further stated that he would abide by the decision of the System Board.

The System Board thereupon heard the evidence for two days and almost one half of another day and as a result of the evidence heard, and after consideration of all facts set forth in the briefs of the attorneys for both sides, this board has arrived at the following conclusions:

I. That there was insufficient evidence to establish that Franklin E. Todd had used alcoholic beverages during the twenty-four-hour period immediately preceding the departure time of Flight No. 27 of January 1, 1964. While some evidence was introduced on this point, it was not sufficient to clearly establish that Mr. Todd had used alcoholic beverages during this twenty-four-hour period of time.

II. The board finds that there is sufficient evidence to

substantiate the second charge filed against Mr. Todd: he influenced and encouraged the first pilot and other crew members to fly Flight No. 27 of January 1, 1964 at a time when he had good reason to believe the first pilot should not take out the flight in the interest of public safety.

III. This board further finds that one of the most serious things that can be done is to discharge any employee, realizing that to do so does create a hardship. But, dismissal seldom puts an end to working life.

IV. The board further finds that public safety in the interest of the flying public must come before any consideration of loss of income or loss of employment by any person employed by an airline. In that interest of safety everything else is secondary.

V. The board further finds that the safety of the public certainly is paramount to loyalty or friendship for other members of the crew and that no effort should be made to cover up the conduct of any crew members out of loyalty when there is an element of danger which would involve the flying public.

In view of upholding the contention of the company as to charge number two, the claim for reinstatement and payment for loss of time is hereby denied.

Respectfully submitted,

/s/ Walter L. Gray
Walter L. Gray, Arbitrator

APPROVED FOR NORTHWEST AIRLINES:
/s/ A. E. Floan
A. E. Floan, Board Member Representing
Northwest Airlines

## DISSENT FOR INTERNATIONAL ASSOCIATION OF MACHINISTS

I concur in the ruling of the board as to charge number one but I most seriously dissent as to the majority of the board as to charge number two and I reserve the right to file a separate dissent opinion.

/s/ Howard P. Ramaley

Howard P. Ramaley, Board Member Representing
International Association of Machinists,
District Lodge 143

Dated this 28th day of September, 1964.

## APPENDIX D-1

In the Matter of Arbitration Between Northwest Air Lines, Incorporated and Air Line Pilots Association, Intnl.

In Re: Captain David G. Rall

Alpa Case No. 5562

Award

This matter comes on to be heard before a five man board of adjustment on Tuesday, October 20, 1964, and that the case was not completed until mid-morning of October 23. Said hearings were held at the Conference Room located in the Executive Offices of the Northwest Airlines, Minneapolis-St. Paul, Minnesota.

The members of the System Board of Adjustment are:

Walter L. Gray, Referee
Leslie C. McQuain, Air Line Pilots Association
George A. Stone, Air Line Pilots Association
A. E. Floan, Northwest Airlines, Inc.
Ronald E. Stelzig, Northwest Airlines, Inc.

James A. Abbott appeared as counsel representing Northwest Airlines, Inc. John G. Loomos and Harry F. Noe of the Legal Department of the Air Line Pilots Association appeared as counsel representing David G. Rall.

Company's Statement of Facts

I. The evidence as introduced at the hearing disclosed that Captain David G. Rall was a captain on a MATS charter flight designated as Flight No. 27 of January 1, 1964, which flew from Hickam Air Force Base in Honolulu, Hawaii, to Eniwetok with stops at Johnston Island and Kwajalein Island.

II. The charges as filed by the company against Captain Rall are as follows: "You served as a crew member on Flight No. 27 on January 1, 1964, having used alcoholic beverages during the twenty-four hour period immediately preceding the departure of Flight No. 27 of January 1, 1964, and you served as a crew member on Flight No. 27 of January 1, 1964, during a period of known physical deficiency and responsibility with respect to the safety of the flight."

III. The evidence disclosed that Captain David G. Rall is 57 years of age and that he has worked as a pilot since 1928. That he was first employed by Northwest Airlines on September 15, 1942, and was later promoted to the status of Captain on April 3, 1943, and remained in the employ of the Northwest Airlines until he was notified on February 28, 1964, that he had been discharged and that his discharge was effective as of February 10, 1964. (Volume VI, page 109, line 22.)

Grievant's Statement of Facts:

I. It was the contention of Captain Rall that he had been assigned on a temporary basis to Hawaii for the month of December, 1963. See Volume VI, page 158, lines 7 and 8. He further contended that when he came back to Honolulu at 1:00 a.m. on the morning of December 31, 1963, and was released from duty, that he was under the definite impression that he had completed his assignment and testified that he had planned on going back to his home in Seattle, Washington, in the late afternoon or evening of December 31, if space was available.

II. The evidence shows and it was admitted by Captain Rall that he had two or three drinks of intoxicating liquor

between the time that he arrived on his flight at 1:00 a.m. on December 31, and 5:30 on the afternoon of the same day when he was suddenly notified that he had been assigned to take out a flight the following morning at 7:00 a.m. on January 1, 1964.

III. The evidence on behalf of Captain Rall further shows that from the time he was notified at 5:30 P.M. on the afternoon of December 31, 1963, to take a flight he had never anticipated and was not duty bound to make, that he did not consume any liquor after he was notified. This was a period of some 14 hours before the flight on January 1, 1964, at 7:00 a.m.

IV. It was further contended that Captain Rall's record was good to very good and they pointed out that this was admitted by at least two or three Company witnesses. The defense contends that the Company witnesses in so testifying negates the reason for discharge and that the punishment was too severe.

## Opinion

The Board in this ruling in no way seeks to set aside any public safety rule, where this rule is applicable, and specifically states that the rules with reference to the consumption of alcoholic beverages is in the interest of public safety and one that is respected by the public. In so ruling we do not attempt to override or sustain any other awards of discipline but have decided this case on the facts and the merits of this case only.

I. The Board finds that the Company was justified in a disciplinary action against Captain Rall by reason of the facts in the case but not to the extent of discharge.

II. The Board further feels that the date of his discharge should be effective as of February 28, 1964, and does not feel that it is proper to make discharge retroactive.

III. It is, therefore, ordered that Captain Rall should be reinstated effective as of November 1, 1964, with full pay from November 1, 1964, but that he be denied any compensation for the period of time from the date of his dismissal on February 28, 1964, to October 31, 1964, and that his discipline shall not in any way affect his seniority, accruals, assignments, and all other employee privileges.

Respectfully submitted,

WALTER L. GRAY
Referee.

Approved for Alpa:
LESLIE C. McQUAIN
GEORGE A. STONE

Dissent for Northwest Airlines, Inc.
A. E. FLOAN (dissent)
RONALD E. STELZIG (dissent)

(Dated as entered on January 8, 1965.)

---

In the Matter of Arbitration between Northwest Airlines, Inc. and Air Line Pilots Association.

Re: Captain David G. Rall
ALPA Case No. 5562

Dissent of Company Members

The Company members of the System Board of Adjustment dissent from the decision and award of the majority in the above-entitled matter for the following reasons:

1. The award fails to recognize that the admitted violation by Rall of the rule which provides that drinking alco-

holic beverages within 24 hours of a flight was ground for discharge.

2. The majority had no authority to modify the penalty assessed against the grievant. Under the provisions of the collective bargaining agreement between the Company and ALPA, the System Board is only empowered to exonerate the grievant or affirm the disciplinary action taken and has no power to reinstate without exoneration; in other words, the Board may reverse or affirm, but cannot substitute its judgment for that of the Company with respect to the penalty.

3. The majority erred in attempting to reimburse the grievant for the period February 9—February 28, 1964. This attempt to change the effective date of discharge was entirely unwarranted because it was not in issue, had not been raised by the Union, nor at any time presented for determination in brief or argument.

4. The decision of the majority ignores the following evidence regarding the grievant's condition on January 1, 1964:

a. To eye witnesses (Smed and Faria) who observed the grievant at approximately 6:00 a.m. on January 1, 1964, testified that he appeared to be under the influence of alcohol and that they closed the door of the aircraft to prevent his falling out.

b. Navigator Harper testified that he considered and treated the grievant as intoxicated.

c. The grievant admitted that he concealed himself on the aircraft for an hour and a half prior to its departure from Hickam AFB to avoid being seen by MATS personnel.

d. The grievant also admitted that he concealed himself on the airplane to avoid being seen at Johnston Island.

e. The grievant admitted that he failed to perform his assigned duties at Hickam AFB, i.e., failed to attend the weather briefing, failed to participate in the flight planning, failed to sign the flight plan which was signed by another crew member, etc.

f. The grievant admitted that it was his own evaluation of his condition at the hotel that he was too sick to serve on the flight.

Accordingly, we submit that the majority had disregarded the realities of the evidence of record and has deliberately glossed over the evidence of the grievant's dereliction with respect to proper concern and responsibility for the safety of the flight.

A. E. FLOAN,
Company Member,

RONALD E. STELZIG,
Company Member.

## APPENDIX D-2

In the Matter of Arbitration Between Northwest Air Lines, Incorporated and Air Line Pilots Association, Intl.

In Re: R. E. Lee Discharge
Alpa Case No. 5563

Award

This matter comes on to be heard before a five man board of adjustment on Monday, November 16, 1964, and ended on the 17th day of November, 1964. Said hearings were held in the Conference Room located in the Executive Offices of the Northwest Airlines, Minneapolis-St. Paul, Minnesota.

The members of the System Board of Adjustment are:

Walter L. Gray, Referee
Leslie C. McQuain, Air Line Pilots Association
George A. Stone, Air Line Pilots Association
A. E. Floan, Northwest Airlines, Inc.
Ronald E. Stelzig, Northwest Airlines, Inc.

James A. Abbott appeared as counsel representing Northwest Airlines, Inc. John G. Loomos of the Legal Department of the Air Line Pilots Association appeared as counsel representing Robert E. Lee.

Company's Statement of Facts

I. Evidence as disclosed at the hearing showed that Robert E. Lee was a copilot on a MATS charter flight designated as Flight No. 27 of January 1, 1964, which flew from Hickam Air Force Base in Honolulu, Hawaii, to Eniwetok with stops at Johnston Island and Kwajalein Island.

II. The charges as filed against copilot Robert E. Lee

are as follows: "You served as pilot and second-in-command on Flight No. 27 on January 1, 1964, with a first pilot having an apparent physical deficiency contrary to your responsibility with respect to the safety of the flight."

III. The evidence discloses that copilot Robert E. Lee has worked for the Northwest Airlines since July 17, 1948, and that he went to work as a copilot on that day. In 1959 he was qualified as a captain ATR type rating on a DC3 as well as a DC6 and DC7. However, he was not in the capacity of captain on the flight in question.

Grievant's Statement of Facts

I. It was the contention of copilot Robert E. Lee that he was notified on December 31, 1963, about 6:00 p.m. that he was to be a member of the flight crew on January 1, 1964, at 7:00 a.m. on No. 27.

II He testified that he did not see Captain David G. Rall until about 6:25 a.m. on January 1, 1964. He further testified that he had heard gossip to the effect that Captain Rall was incapacitated to take out the flight, but that after talking to Captain Rall, he, copilot Robert E. Lee, testified that he felt it was safe to proceed on the flight. That he was directed by Captain Rall to take out the flight and that Captain Rall would bring it back. Then the flight went off without incident.

Opinion

I. The Board recognizes the safety rule and specifically states that the interest of public safety is paramount at all times; that any pilot or copilot who does not have this rule constantly in mind is not working in the interest of the company and certainly not in the interest of the public. The System Board must, therefore, determine whether or

not the discharge was justified under the circumstances as brought out in the evidence of the case.

II. It has been repeatedly held, and we have so held in a companion case, that discharge is the capital punishment of employee-employer relations and that the company has the right to punish an employee but it must be kept uppermost in the minds of this Board whether or not, under the circumstances involved in this case, there was sufficient evidence to justify the discharge of copilot Lee.

III. In view of the statements that had been relayed to him by other crew members the wise course of action might have been to have discussed the entire matter with the station manager.

IV. The majority of the Board feels that discharge is too severe in view of all the facts and mitigating evidence. Copilot Lee felt that he had exercised proper discretion in taking out the flight especially when he had been directed by his superior, Captain Rall, to "fly the trip out". But because he did not exercise extensive caution in view of what he had heard that some discipline should be imposed.

V. It is, therefore, ordered that copilot Robert E. Lee be reinstated effective as of May 1, 1964, with full pay from May 1, 1964. That he be denied any compensation for the period of time from February 28, 1964, to May 1, 1964, and that his discharge shall not in any way affect his seniority, accruals, assignments, and all other employee privileges.

Respectfully submitted,

WALTER L. GRAY,
Referee.

Approved for Alpa:
LESLIE C. McQUAIN
GEORGE A. STONE

Dissent for Northwest Airlines, Inc.
A. E. FLOAN (dissent)
RONALD E. STELZIG (dissent)

(Dated and entered on January 8, 1965.)

---

In the Matter of Arbitration between Northwest Airlines, Inc. and Air Line Pilots Association.

Re: R. E. Lee Discharge
Alpa Case No. 5563

Dissent of Company Members

The Company members of the System Board of Adjustment dissent from the decision and award of the majority in the above-entitled matter for the following reasons:

1. The majority had no authority to modify the penalty assessed against the grievant. Under the provisions of the collective bargaining agreement between the Company and ALPA, the System Board is only empowered to exonerate the grievant or affirm the disciplinary action taken and has no power to reinstate without exoneration; in other words, the Board may reverse or affirm, but cannot substitute its judgment for that of the Company with respect to the penalty.

2. The majority erred in attempting to reimburse the grievant for the period February 9—February 28, 1964. This attempt to change the effective date of discharge was entirely unwarranted because it was not in issue, had not been raised by the Union, nor at any time presented for determination in brief or argument.

3. The decision of the majority ignores the following evidence:

a. Two eye witneeses (Smed and Faria) who observed Captain Rall at approximately 6:00 a.m. on January 1 testified that he appeared to be under the influence of alcohol and that they closed the door of the aircraft to prevent his falling out.

b. Navigator Harper testified that he considered and treated Captain Rall as intoxicated.

c. The grievant had admitted to Mr. Justiss that when he got into the cockpit of the airplane he found Captain Rall asleep, his speech was slurred and he regarded him as drunk and unable to function on the first leg of the outgoing portion of the flight to Johnston Island.

d. The grievant waited an hour after being told that Rall was "drunker than a skunk" before making an investigation of what he had heard and at no time did he probe the basis thereof.

e. The grievant knew that Rall did not perform the normal Captain's duties at Hickam AFB, i.e., failed to participate in the flight planning, failed to sign the flight plan, etc., and had proceeded directly to the aircraft on reaching the airport and concealed himself therein so as to avoid being seen.

Accordingly, we submit that the majority has disregarded the realities of the evidence of record and has deliberately glossed over the evidence of the grievant's dereliction with respect to proper concern and responsibility for the safety of the flight.

A. E. FLOAN,
Company Member,

RONALD E. STELZIG,
Company Member.

LIBRARY
SUPREME COURT, U. S.

FILED
MAY 20 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

October Term, 1970
No. 1623

FRANKLIN E. TODD,
*Petitioner,*

v.

NORTHWEST AIRLINES, INC.,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM RUSH MCKELVY
*Attorney for Respondent Northwest Airlines, Inc.*

SKEEL, MCKELVY, HENKE,
EVENSON & BETTS
Of Counsel

Office and Post Office Address:
1020 Norton Building
Seattle, Washington 98104
Telephone: (206) 623-1031

CRAFTSMAN & SET PRESS — SEATTLE, WASHINGTON

## SUBJECT INDEX


| | Page |
|---|---|
| Counterstatement of Facts | 1 |
| Argument in Opposition to Petition for Writ of Certiorari | 5 |
| Conclusion | 9 |


## TABLES OF AUTHORITY

### Table of Cases


*Brotherhood of R.R. Trainmen v. Denver & R.G.W.R., Co.*, (C.A. Colo., 1966) 370 F.2d 833, cert. denied 87 S. Ct. 1375, 386 U.S. 1018, 18 L.Ed.2d 456 ..... 6

*Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 21 L.Ed.2d 301, 89 S. Ct. 337 (1968) .... 8

*Edwards v. Capital Airlines*, 176 F.2d 755 (C.A.D.C., 1949) ..... 7

*Gunther v. San Diego & Ariz. E. R. Co.*, 382 U.S. 257, 15 L.Ed.2d 308, 86 S. Ct. 368 (1965) ....5, 6

*Howard v. St. Louis-S.F. Ry. Co.*, (C.A. Mo., 1966) 361 F.2d 905, cert. denied 87 S. Ct. 598, 385, U.S. 986, 17 L.Ed.2d 448 ..... 6

*Northwest Airlines, Inc. v. Airline Pilots Ass'n. Intern.*, (C.A. Minn., 1967) 373 F.2d 136, cert. denied 88 S. Ct. 77, 389 U.S. 827, 19 L.Ed.2d 83 ..... 6

*Rosen v. Eastern Air Lines, Inc.*, (C.A. Fla., 1968) 400 F.2d 462, cert. denied 89 S. Ct. 1307, 394 U.S. 959 22 L.Ed.2d 560, rehearing denied 89 S. Ct. 1741, 395 U.S. 917, 23 L.Ed.2d 232 ..... 5-6

*Thorgeirsson v. Trans World Airlines, Inc.*, (D.C.N.Y., 1968) 288 F. Supp. 71 ..... 6


### Statutes


45 U.S.C.A. §153, First (p) ..... 2, 6

45 U.S.C.A. §153, First (q) ..... 3, 4, 6

45 U.S.C.A. §184 ..... 2


### Other Authority


1966 U.S. Code Congressional and Administrative News, page 2287 ..... 5

IN THE

# Supreme Court of the United States

October Term, 1970

No. 1623

FRANKLIN E. TODD,
*Petitioner,*

v.

NORTHWEST AIRLINES, INC.,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent respectfully states that review on Writ of Certiorari should be denied in this matter as petitioner cannot show facts which would justify this court granting such an extraordinary writ. The record shows that the Court of Appeals for the Ninth Circuit acted within its jurisdiction and proceeded in accordance with the essential requirements of the law affirming and adopting the decision of United States District Court for the Western District of Washington, Northern Division.

## COUNTERSTATEMENT OF FACTS

For the reason that respondent feels there are inaccuracies and omissions in the statement contained in the petition, respondent will restate facts pertinent to this petition.

Frank Todd was employed as a flight engineer for Northwest Airlines, Inc. On or about February 28, 1964, Todd was discharged by Northwest Airlines for the stated reasons that (1) Todd had served as a crew member on a flight having used alcoholic beverages during the 24-hour period immediately preceding the departure time and (2) he influenced and encouraged the first pilot and other crew members to fly at a time when he knew of the physical deficiency of the first pilot assigned to the flight. Under the collective bargaining agreement between Northwest Airlines, Inc., and the International Association of Machinists (IAM) which represented the flight engineers employed by Northwest, grievance procedure provided for empaneling a System Board of Adjustment to decide disputes such as existed between Todd, the discharged employee, and Northwest Airlines. This System Board was established in accordance with the provisions of the Railway Labor Act, 45 U.S.C.A. §184. The Railway Labor Act provides that such awards are enforceable against a carrier by the District Courts.

> "Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, . . . *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order." 45 U.S.C.A. §153, First, (p).

If an employee or group of employees is aggrieved by an award of the Systems Board, a petition for review may be filed in the District Court.

> "The Court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28." 45 U.S.C.A. §153, First, (q).

The System Board of Adjustment empaneled to hear Todd's grievance was composed of three members, one selected by IAM (the union), one selected by Northwest Airlines (the company), and a neutral selected by the other two members, pursuant to the terms of the collective bargaining agreement.

The union assigned an official, Arthur Pedersen, to prosecute Todd's grievance at the hearing. Todd wished to be represented by his own counsel as Todd had earlier been expelled from the union on a charge of dual unionism, and Pedersen had represented the union in the proceeding in bringing such charges against Todd. Accordingly, an agreement was made, acceptable to the members of the System Board, between Todd, Mr. Schumacher, Todd's personal attorney, and Pedersen. The agreement was that (1) Pedersen retained the right of representation as to any contractual application under the flight engineer's agreement, (2) Schumacher would conduct the entire presentation on Todd's behalf, calling and interrogating witnesses and (3) Todd freely and fully agreed to be

bound by the decision of the System Board [District Court's Memorandum Opinion, Petition A-15]. The System Board proceeding was conducted in accordance with this agreement.

After a three-day hearing, the System Board rendered its decision. The majority of the Board, consisting of the neutral and the representative of the company, disallowed the first charge brought by the company but upheld Todd's discharge on finding that there was sufficient evidence to substantiate the charge that

> "He influenced and encouraged the first pilot and other crew members to fly Flight No. 27 of January 1, 1964, at a time when he had good reason to believe the first pilot should not take out the flight in the interest of the public's safety."

The System Board member representing IAM, Howard P. Ramaley, concurred with the majority as to disallowance of the first charge but dissented from the majority on their finding as to the second charge.

Todd then began an action in the United States District Court for the Western District of Washington, Northern Division, to set aside the order of the System Board and for contract damages on account of wrongful discharge. On motion for summary judgment brought by both parties, the court reviewed the decision of the System Board in accordance with the jurisdiction given by 45 U.S.C.A., §153 First (q) [Petition, A-10].

The district court extensively examined and reviewed exhibits and briefs submitted by both parties and, finding that the award of the System Board of Adjustment was neither arbitrary nor capricious or void for fraud, granted summary judgment for the defendant.

## ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In *Gunther v. San Diego & Ariz. E.R. Co.*, 382 U.S. 257, 15 L.Ed.2d 308, 86 S. Ct. 368 (1965), this court discussed the Congressional policy both in establishing and giving finality to decisions of System Adjustment Boards empaneled to hear "minor" grievances. Such boards, composed equally of representatives of management and labor, are peculiarly familiar with and knowledgeable in settling the daily grievances that constantly exist in the transportation industry. The benefit both to the aggrieved employee and the industry of having these competent and readily available forums would be lost if finality were not granted to a decision of such board. In affirmance of the very limited judicial review granted by the *Gunther* decision, the statute governing the finality of such board decisions was subsequently amended by Congress. The Congressional committee report indicates that Congress, in amending the statute, intended judicial review to be limited, and it was not intended that a decision of a board would be upset merely because the court disagreed with such award. 1966 U.S. Code Congressional and Administrative News, page 2287.

The Fifth Circuit has recently stated:

> "It is the voluntary act of the employee which gives the actions of the System Board such final authority. Upon his discharge, an employee has a choice—he may sue in court for a breach of contract of employment, or he can proceed under the agreement and the Railway Labor Act before the Board. He may not do both. Hence, 'granted jurisdiction in the Board, its decisions on either factual or legal or mixed issues, are not reviewable in court.' *Woolley v. Eastern Airlines, supra.*" *Rosen v. Eastern Air Lines, Inc.*, (C.A.

Fla. 1968) 400 F.2d 462, cert. denied 89 S.Ct. 1307, 394 U.S. 959, 22 L.Ed.2d 560, rehearing denied 89 S.Ct. 1741, 395 U.S. 917, 23 L.Ed.2d 232.

An award of an airline System Board of Adjustment was held final and conclusive in *Thorgeirsson v. Trans World Airlines, Inc.*, (D.C.N.Y. 1968) 288 F. Supp. 71. In so holding, the court said:

> "The extent to which this Court may review the award of the Flight Engineers' Board is narrowly circumscribed. . . . Moreover, the Railway Labor Act requires the District Court to accept the System Adjustment Board's determination of the merits of a grievance (citations omitted). The determination by the Flight Engineers' Board that Thorgeirsson retained his seniority as a flight engineer and was entitled to reinstatement is final and conclusive; the Court cannot redetermine the issue."

This court has consistently denied issuance of a Writ of Certiorari where the record failed to disclose that the lower court erred in exercising its jurisdiction under 45 U.S.C.A. §153 First (p) or (q). *Northwest Airlines, Inc. v. Airline Pilots Ass'n. Intern.*, (C.A. Minn. 1967) 373 F.2d 136, Certiorari denied 88 S.Ct. 77, 389 U.S. 827, 19 L.Ed.2d 83; *Brotherhood of R.R. Trainmen v. Denver & R.G.W.R. Co.*, (C.A. Colo. 1966) 370 F.2d 833, Certiorari denied 87 S.Ct. 1375, 386 U.S. 1018, 18 L.Ed.2d 456; *Howard v. St. Louis-S.F. Ry. Co.*, (C.A. Mo. 1966) 361 F.2d 905, Certiorari denied 87 S.Ct. 598, 385 U.S. 986, 17 L.Ed. 2d 448. The decision of the Court of Appeals for the Ninth Circuit now before this court on petition is entirely consistent with these decisions rendered in other circuits as well as this court's decision in *Gunther, supra.*

Petitioner's claim that there was "lack of fair representation because of hostility between the grievant and his

union representative" is wholly without merit. Petitioner at no time in this litigation has charged that there was hostility between himself and the System Board member appointed by IAM, Mr. Ramaley. Mr. Ramaley voted for Todd and against Northwest Airlines on both charges. One wonders what more he could have done on Todd's behalf. Even if Todd had hostile feelings towards Pedersen because of the dual unionism charge, Todd was in no way denied fair representation because of any act of Pedersen. (The record fails to disclose any reciprocity of feelings by Pedersen.) Pedersen voluntarily, pursuant to the agreement with Todd and his counsel, limited his participation in the board hearing to presenting the contractual rights of flight engineers employed by Northwest Airlines. The record of the hearing shows that Todd's grievance was thoroughly and vigorously advocated by Mr. Schumacher, his personal attorney.

The situation present in the Todd hearing was entirely dissimilar from that examined by the court in *Edwards v. Capital Airlines*, 176 F.2d 755 (C.A.D.C. 1949). In *Edwards*, the real dispute was between the grievant and the union which represented the majority of the pilots. The court found that

> "And in the case before us, the union did take a position in favor of the majority of the employees. In fact, it assumed a burden of presenting and pressing the claims of that majority."

The union position in the Todd hearing was not similarly bifurcated. As the trial court stated,

> "Here the union would and apparently did have a definite interest in seeing to it that no precedent was set allowing flight engineers to be fired in circum-

stances such as plaintiff contended existed." (Petition, A-13)

This court's decision in *Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 21 L.Ed.2d 301, 89 S.Ct. 337 (1968), does not present grounds for granting the petition for certiorari. There was no "bias or appearance of bias" by members of the System Board of Adjustment which heard the Todd grievance. In *Coatings, supra*, six members of this court held that where the neutral on an arbitration board had an undisclosed financial relationship with the adverse party, such member had breached standards of fairness and impartiality. Even if the *Coatings* rule should be applicable to a System Board of Adjustment, petitioner has made no allegations that Walter Gray, the neutral, had a financial relationship with the adverse party or was in any way biased.

The decision of the Court of Appeals noted that

> "Another System Board disciplined pilot Rall and co-pilot Lee, but did not order their discharge. That award was left undisturbed by *Northwest Airlines, Inc. v. ALPA, Rall and Lee*, 373 F.2d 136 (8th Cir.) Cert. den. 389 U.S. 827."

While the discipline initially imposed upon all these employees by Northwest Airlines was the same, the fact that the Rall and Lee System Board modified Northwest Airlines' action does not render the decision of the Todd System Board inconsistent, much less invalid. The trial court thoroughly considered and evaluated the results of the separate System Board hearings.

> "However, the two proceedings were separate proceedings, and the evidence was not exactly the same in each. Nor is it certain that the witnesses which seemed most credible in the Todd case were just as

g. The results of
believable in the second proceedinith the presump-
the two cases are fully consistent wnsidered the evi-
tion that the board in each case coade its ruling in
dence before it in the case, and mPetition, A-19)
accordance with that evidence." (1

## CONCLUSION

The record clearly shows that this court should deny the petition for certiorari. The Court of Appeals for the Ninth Circuit has acted properly and in accordance with the laws of the land and the applicable precedents established by this court. Its decision based on the District Court's well-reasoned memorandum opinion is consistent with decisions rendered in other courts of appeal on the same matter.

Respectfully submitted,

WILLIAM RUSH MCKELVY
*Attorney for Respondent*
*Northwest Airlines, Inc.*

SKEEL, MCKELVY, HENKE,
EVENSON & BETTS
Of Counsel